89-873

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HUGH L. JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF HUGH L. JOHNSON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

S. ALLEN EARLY, III
(Counsel of Record)
150 West Jefferson
Detroit, Michigan 48226
(313) 963-6420
Attorney for Hugh L. Johnson

December 1, 1989

QUESTIONS PRESENTED

I.

Does a five year sentence violate the due process clause of the Fifth Amendment where the sentencing judge sentences on the basis of a pre-sentence report erroneously dictating that a five year mandatory minimum is required, that probation is "not allowed", and thereafter fails to balance the positive factors of Petitioner's life that might mitigate toward a lesser sentence?

II.

Is a five year sentence illegal when imposed on the basis of an erroneous pre-sentence report dictating a five year mandatory minimum, and the sentencing judge's erroneous belief that a five year mandatory minimum is required?

III.

Was the warrantless arrest and subsequent warrantless search of Petitioner in violation of the Fourth Amendment when there were no objective and particularized facts to justify the arrest and when the Court of Appeals has already conceded that the admission of evidence seized pursuant to the search was not harmless error?

IV.

Did the failure of the prosecutor to advise the jury and correct the testimony of a witness which the prosecutor elicited and knew to be false deny petitioner due process of law under *Giglio* v. *United States*, 405 U.S. 150 (1972)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION OF HUGH L. JOHNSON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Hugh L. Johnson, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 23, 1989, which affirmed the judgment of conviction and sentencing of Petitioner in the district court. Certiorari is requested in order to correct a decision of the court of appeals which sanctions a departure

from the accepted and usual course of judicial proceedings by the district court so as to call for an exercise of this Court's power of supervision, and in order to correct a decision of the court of appeals which decides federal questions in conflict with applicable decisions of this Court.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is unreported and is reprinted at A-1. By order dated October 3, 1989, the Sixth Circuit denied Petitioner's petition for rehearing. This order is unreported and is reprinted at A-6.

JURISDICTION

The opinion of the Sixth Circuit was issued May 23, 1989. The Sixth Circuit denied Petitioner's timely filed petition for rehearing on October 3, 1989. Pursuant to Rule 20, Rules of the Supreme Court, this Petition has been filed within 60 days of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5, United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 4, United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

This case originated in the United States District Court, Eastern District of Michigan. Petitioner was indicted on January 28, 1988, in a one count Indictment charging a violation of 21 U.S.C. § 846 and 841, attempted possession with intent to distribute cocaine. The date of the offense charged in the Indictment was June 2, 1987.

Petitioner's case was tried to a jury; Petitioner did not testify. The jury returned a verdict of guilty as charged. Petitioner was sentenced to five years imprisonment and is now free on bond pending appeal.

Prior to trial, Petitioner, represented by other counsel below, filed a motion to suppress evidence seized as a result of a warrantless arrest of Petitioner and the warrantless search of Petitioner incident to the arrest on the ground that probable cause for the arrest did not exist. The foregoing

motion was not heard because the trial judge ruled that it was filed after the motion cut-off date. Later, during trial, the trial court ruled, in response to evidentiary objections to any evidence seized as a result of the search, that there was probable cause to arrest Petitioner.

At trial, a witness testified that Petitioner checked a package in Los Angeles with American Airlines for shipment to Detroit, paid $47.00 in cash and was shy or nervous because he did not talk to the American Airlines employee witness who accepted the package. The employee later opened the package and found cocaine, whereupon authorities in Los Angeles and Detroit were notified and the package was shipped by authorities to Detroit for surveillance of pick-up. The only description given to Detroit authorities of the man who delivered the package in Los Angeles, for purposes of surveillance and the subsequent arrest of Petitioner, was that of a young black man.

Petitioner, unknown to the officer who later arrested him in Detroit, flew to Detroit. Once in Detroit, Petitioner attempted to claim the package at Metropolitan Airport package pick-up and was observed by the arresting officer. Due to a logistical problem, airline personnel working in conjunction with law enforcement authorities did not allow Petitioner to claim the package and suggested that he return in 15 minutes, whereupon Petitioner, instead of waiting 15 minutes for the box, eventually boarded a plane for Los Angeles. Thus, the only facts that the arresting officer knew at the time of arrest were that Petitioner had attempted to claim the package and then, instead of waiting 15 minutes for the package, ultimately boarded a plane for Los Angeles.

The arresting officer testified at trial that the only reason he arrested Petitioner was because he had been instructed to "detain" Petitioner by the U.S. Attorney's Office since Petitioner was boarding a flight to Los Angeles. The arresting officer did not even know Petitioner's name prior to the arrest. Instead of detaining Petitioner as requested by

the U.S. Attorney's office, the arresting officer arrested Petitioner without probable cause and without a warrant for the instant offense. The testimony of the arresting officer, Agent Denton, as to what he did not know is important:

Q. Now, when you stopped Mr. Johnson—when you placed him under arrest, you did not have. —I am sorry. When you stopped Mr. Johnson you did not know that he had the package [in Los Angeles], correct, you didn't have that information?

A. No.

Q. And you didn't know when he had arrived in Detroit, did you?

A. No.

Q. You had no idea?

A. (Negative nod).

Q. In fact, you didn't know his name at that time, is that correct?

A. His real name, no, I did not.

Q. You just knew that at the time that someone—that this person had gone to inquire about the package?

A. That is correct.

Q. And at that point, with that information, you placed him under arrest.

A. No.

Q. You didn't place him under arrest on the airplane?

A. Yes, I did.

Q. You didn't have Exhibits 5 and 6, isn't that correct?

* * *

A. No, I had nothing belonging to Mr. Johnson at that time.

Q. And you didn't know his name at the time that you arrested him.

A. No, I didn't know his name.

(May 18, 1988 TR. p. 169) The Sixth Circuit opinion acknowledges that the search incident to Petitioner's arrest revealed and led to the introduction of evidence not subject to harmless error. Opinion, p. 2, n. 2, A-3. The Sixth Circuit opinion also concluded, on the basis of facts not known to the arresting officer, that there was probable cause to arrest Petitioner.

During trial, Petitioner's defense was one of an unknowing courier. The package at issue in this case was labeled as containing video equipment and was addressed as follows according to trial testimony: an individual named Greg French was listed as the shipper and Greg French's residence address was listed as the shipper's address on the airbill; a phone number, discussed below, was listed as the shipper's telephone; the recipient's name was listed as Hugh Johnson with an address across the street from that of Petitioner's boyhood home/parents in Detroit, and the recipient's telephone number listed on the airbill belonged to an individual named Brian Webster, at another location.

Greg French testified at trial that he is a friend of Petitioner, was engaged in a video business with Petitioner in California and resided at the shipper's address on the airbill for the package. French, under questioning by the government also testified that he never had a phone number as listed next to the shipper's name on the airbill. Further, French denied knowing anything about the package containing cocaine.

The government prosecutor knew that French lied about not owning a telephone number as listed next to the shipper's

name on the airbill and brought the false testimony to the attention of the Court and Petitioner's trial counsel. The jury was never informed of French's false trial testimony elicited by the government.

Petitioner's initial brief in the Sixth Circuit challenged the sufficiency of the evidence, rather than attacking the false testimony of French issue or the credibility of any witness. The government responded to this argument in its brief with assertions about the credibility of witnesses, an issue not in dispute at that time, thus placing in issue the credibility of French. In Petitioner's Reply Brief in the Sixth Circuit, Petitioner raised the due process/credibility issue, with respect to witness French. The Sixth Circuit did not address the due process issue in its per curiam opinion.

At sentencing, the trial court stated that it believed a mandatory minimum of five years applied to Petitioner's conviction for attempted possession of cocaine. The pre-sentence report for Petitioner also erroneously stated that a mandatory minimum applied and added that "statutory provisions do not allow for probation and/or parole." (R. 42: Pre-Sentence Report at p. 7.) No balancing was given in the pre-sentence report to the positive aspects of Petitioner's life, which include that the instant offense was the first arrest ever for Petitioner who previously worked all his adult life with no indication that the instant offense was anything but an aberration, because the probation office which drafted the pre-sentence report thought a mandatory minimum applied.

The government at sentencing, however, indicated to the court that a mandatory minimum did not apply to this offense, citing *Bifulco* v. *United States*, 447 U.S. 381 (1980). Petitioner's trial counsel also objected to a mandatory minimum and asked the sentencing court to consider the positive aspects of Petitioner's life. Nevertheless, the trial court imposed a five-year mandatory minimum sentence and stated:

> That is the Department of Justice interpretation of it [no mandatory minimum]. I do not interpret it that way
>
> * * *
>
> It is the sentence of the Court that the defendant be commited to the custody of the Attorney General for a period of five years and the $50 special assessment be imposed.

(July 15, 1988 Sentencing at p. 321, 323.)

Later, during a motion for bond pending appeal, when Petitioner was first represented by the undersigned counsel, the trial court made conflicting statements as to whether a mandatory minimum sentence was imposed. The trial court stated:

> I think as a matter of law there is a five year minimum, I still state that, and I disagree with what [Petitioner's former] counsel said and the position of the Department of Justice . . .

(July 28, 1988 Hearing on Bond Pending Appeal, Tr. p. 376.) The trial court also stated:

> Mr. Early, before we get started, you spent some of your brief talking about the mandatory minimum . . . . As a matter of fact, I did not know until we got into Court there was a five year minimum . . . I did not give him five years because I thought I had to.

Id. at p. 374. Finally, the trial court also stated:

> I think there is a close question on sentencing. It is not likely that I would impose a probation period. I just can't say, if I had more information . . . .

Id. at 399.

The Sixth Circuit agreed with Petitioner that a mandatory minimum does not apply to this attempt offense, but concluded that since the sentencing judge stated "at the time of sentencing" that he would have given the same sentence regardless of the minimum, there was no error. The tran-

script of sentencing, however, does not contain any statement by the sentencing judge that he would have given the same sentence regardless of a minimum. Such statements, along with statements that he might have given a different sentence, were made post sentencing.

I. A Five Year Sentence Imposed on the Basis of a Pre-Sentence Report Erroneously Dictating a Five Year Mandatory Minimum and the Judge's Erroneous Belief That a Five Year Minimum Applies Violates Due Process and/or is an Illegal Sentence

The offense for which Appellant was convicted, 21 U.S.C. § 841 and 846, does not provide for a mandatory minimum. The provisions of 21 U.S.C. § 846 do not set forth a minimum sentence, only a maximum sentence, and therefore the mandatory minimums of 21 U.S.C. § 841 do not apply to the offense of attempt possession of cocaine. *See Bifulco* v. *United States*, 447 U.S. 381 (1980). It also merits note that the Sentencing Reform Act of 1989, applicable only to offenses committed on or after November 1, 1987, does not apply to this offense.

The pre-sentence report in this matter contained material erroneous information relating to a mandatory minimum and Petitioner's trial counsel objected to the erroneous information. While Petitioner's trial counsel did not object to the pre-sentence report itself which contained the error, she did object to a mandatory minimum. And the mandatory minimum reference in the pre-sentence report, together with a pre-sentence report geared solely toward a mandatory minimum without the possibility of probation, is the essence of the error claimed in this Petition.

The wording of the pre-sentence report in this matter was structured toward a mandatory minimum, informed the Court that probation or parole "are not allowed", and, as a result, failed to balance the positive aspects of Petitioner's life that might mitigate toward a lesser sentence. The three-

judge sentencing panel in the Eastern District which confers regarding sentencing presumably reviewed the incorrect pre-sentence report, and the sentencing judge reviewed same and agreed that he thought a mandatory minimum was called for by the offense statute. A great injustice has been dealt Petitioner in that *no* consideration was *allowed* for a lesser sentence. The post-hearing remarks of the sentencing judge during hearing for bond pending appeal highlight the error caused by an erroneous pre-sentence report. The trial judge is even unsure what, if anything, he would have done if the pre-sentence report had contained a full panoply of balanced information and a balanced recommendation. The pre-sentence report was a perfunctory report stating that "statutory provisions do not allow for probation or parole." Given the outstanding nature of Petitioner's past, with nothing negative to bring to the attention of the trial court, the pre-sentence report gave little focus and no balance to the positive aspects of Petitioner's life because a mandatory minimum precluded any such balance. It was simply less time consuming and easier to forget a balanced report in light of the erroneous mandatory minimum conclusion in the pre-sentence report.

Petitioner deserves, under the due process clause, to have a pre-sentence report which includes a correct interpretation of the sentencing provision and such other recommendations as the probation department deems advisable based upon the correct interpretation of the offense statute. Petitioner also deserves, under the due process clause, to have an Eastern District three-judge panel and the sentencing judge make a decision based upon a pre-sentence report with correct minimum sentence information and recommendations based thereon. At sentencing, the record is clear that the sentencing judge felt a mandatory minimum applied and thereafter gave Petitioner five years. This Court should correct the injustice that resulted from an error regarding minimum sentence and not rely, as did the Sixth Circuit, on

post sentencing remarks (made 13 days after sentencing) that serve only to highlight the confusion which existed at sentencing.

II. The Government's Failure to Correct and Advise the Jury of False Trial Testimony Elicited by the Government Violates the Due Process Clause

Witness Greg French lied about not owning the telephone number as listed next to the shipper's name on the airbill. The government attorney approached the bench and advised the judge and defense counsel about the lie. Neither the government or the court brought the falsity, elicited by the government, to the attention of the jury as required by the due process clause. *Giglio* v. *United States*, 405 U.S. 150, 153-55 (1971); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). The government may not use false testimony to obtain a conviction, and it has a duty to present all material testimony to a jury. *Id.* Nondisclosure to the jury is the "responsibility of the prosecutor." *Giglio* v. *United States*, *supra*, 405 U.S. at 154. The lie of French was material and should have been brought to the attention of the jury, and could in "reasonable likelihood have affected the judgment of the jury" or "may have had an effect on the outcome of the trial." *Napue* v. *Illinois*, *supra*, 360 U.S. at 271, 272.

In this case, given the posture of the defense of unknowing courier, whether or not French packed the package was crucial. Petitioner did not testify. The sender's call back number indicates that it was Greg French, not Petitioner who flew to Detroit, who was available in Los Angeles for a call from the airlines in case any questions arose. The jury may well have concluded that, because French lied about the telephone number on the witness stand, it was French who packed the package without Petitioner's knowledge of the contents. Once the jury believes that French packed the package or lied regarding any aspect of the package, the question of Petitioner's participation is affected, and there

is a reasonable likelihood that the verdict could have been affected. This Court has aptly stated the predicament that Petitioner faced in this case with nondisclosure to the jury:

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witnesses in testifying falsely that defendant's life or liberty may depend.

Napue v. *Illinois*, *supra*, 360 U.S. at 269.

III. There Was Absolutely No Probable Cause for the Arrest of Petitioner and the Fruits of the Search Incident to the Arrest Should Have Been Suppressed

The Sixth Circuit concluded that probable cause existed for the arrest of Petitioner because

> Johnson had attempted to claim the cocaine filled package, and, instead of waiting the fifteen minutes for the box he had flown halfway across the country to deliver, he chose to take the next available flight back to the west coast. This behavior was inconsistent with that of an innocent courier, and constituted sufficient probable cause to arrest.

Opinion at p. 4, A-5. The Sixth Circuit has substituted its view of all the facts gathered together after the time of arrest for the facts known at the time of arrest by the arresting officer. Quite simply, the arresting officer even admitted that prior to arrest he did not know Petitioner's name, did not know that Petitioner had delivered a package in Los Angeles and did not have any description to place Petitioner as having delivered the package in Los Angeles, did not know that Petitioner had flown across the country to Detroit, and did not know that Petitioner was going "back" to Los Angeles (as opposed to boarding a plane for Los Angeles). The only facts that the arresting officer knew were that Petitioner had attempted to claim a package containing cocaine and then, instead of waiting 15 minutes for the package, eventually boarded a plane for Los Angeles.

It is clear that the arresting officer did not have probable cause to arrest Petitioner, but rather prematurely reacted on the basis of instructions from the U.S. Attorney's office to "detain" Petitioner because he was boarding a plane. Instead of briefly detaining Petitioner and finishing the investigation, Petitioner was arrested and searched.[1]

The arresting officer did not have any facts that indicated "a probability or substantial chance of criminal activity" as required under *Illinois* v. *Gates*, 462 U.S. 213, 244 n.13 (1983). There are no objective or particularized facts to justify this arrest. *Wong Sun* v. *United States*, 371 U.S. 471 (1963). As the Sixth Circuit opinion acknowledges, Petitioner's arrest and the search incident thereto led to the admission of evidence at trial that was not harmless error. Opinion at p. 2, n. 2, A-3.

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[1]The government brief will undoubtedly discuss various facts known to other law enforcement officers who stopped Petitioner in the airport—after he attempted to claim the package and prior to boarding the aircraft—but which were not communicated to the arresting officer. These facts—including, among others, that Petitioner had arrived from Los Angeles—were not known to the arresting officer at the time of arrest.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari.

S. ALLEN EARLY, III
(Counsel of Record)
150 West Jefferson
Detroit, Michigan 48226
(313) 963-6420

Attorney for Hugh L. Johnson

December 1, 1989

APPENDIX

NOT FOR PUBLICATION

88-1791

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HUGH JOHNSON,
Defendant-Appellant.

ON APPEAL From The Eastern District of Michigan.

Before: KEITH and KENNEDY, Circuit Judges; and McQUADE, District Judge.*

PER CURIAM: Defendant Hugh Johnson ("Johnson") appeals his jury conviction for attempted possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). For the reasons stated below, we AFFIRM.

I.

On June 1, 1987, Johnson shipped a box to Detroit, Michigan from the Los Angeles priority package office of American Airlines. On the airbill filed out at the time of shipping, Johnson signed the name of Greg French as the sender and his own name as the recipient. The shipping clerk Robert Greb ("Greb") became suspicious of Johnson's

* The Honorable Richard B. McQuade, Jr., U.S. District Judge for the Northern District of Ohio, sitting by designation.

"shy and nervous demeanor" and opened the box[1] after Johnson left the office. Upon opening the box, Greb found two empty boxes, an empty flight bag, and another box that contained two and half kilograms of a white substance wrapped in plastic. Greb contacted the Los Angeles police, who confirmed that the white substance was, in fact, cocaine. After photographing the contents of the package, the Los Angeles police made a controlled delivery to Detroit.

In Detroit, the cocaine was replaced with a non-narcotic substance and placed on the conveyor belt with the other packages to see who would claim it. After no one claimed the package that day it was placed in the DEA safe overnight. The next morning DEA agents called the American Airlines baggage office, instructing the clerk to delay anyone who tried to claim the package because the agents were delayed in getting to the airport.

On June 2, 1987, Johnson arrived in Detroit on a "red-eye" flight from Los Angeles by way of Kansas City. When Johnson went to the American Airlines package claim area to pick up the box he had shipped the previous day, he was told that there was a delay in unloading the plane and to come back in fifteen to twenty minutes. Before leaving the American Airlines claim area, Johnson asked the clerk about flights to Los Angeles and Atlanta. Johnson then spoke with a clerk at the United Airlines ticket counter. As he walked away, DEA agents who had been watching stopped him and asked to see his ticket and some identification. Johnson gave the agents his business card, showed them his one way ticket from Los Angeles to Detroit, but had no return ticket. He told the agents that he was in Detroit to deliver an important package to a friend, Brian Robertson, at which point the agents thanked him and let him go. Before boarding a Northwest flight for Los Angeles, Johnson made a phone call. After he boarded the airplane, DEA agents arrested

[1] Greb was also suspicious because the package was extremely light, considering Johnson had told him that the box contained video equipment.

Johnson. A search incident to that arrest revealed the sender's receipt of the airbill filled out in Los Angeles.[2]

A four day jury trial resulted in a guilty verdict, and on July 15, 1988, Johnson was sentenced to five years imprisonment. Johnson now appeals this conviction.

II.

Johnson first argues that Greb was acting as a government agent and not as a private citizen when he opened the box, and that, therefore, Greb's search of the box was unconstitutional, and should have been suppressed. This argument is unsupported by the evidence and Greb's testimony. To prevail on a motion to suppress evidence allegedly obtained from an unconstitutional search, a defendant must show that the search was conducted by government agents or that a private citizen was acting on behalf of the government at the time the search was conducted. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). Since Greb was a private citizen, Johnson had the affirmative duty to show that the police either encouraged, instigated or participated in the search, and that Greb initiated the search with the intent of assisting the police. *United States v. Jacobsen*, 466 U.S. 109 (1984); *United States v. Lambert*, 771 F.2d 83, 89 (6th Cir.) *cert. denied*, 474 U.S. 1034 (1985); *United States v. Howard*, 752 F.2d 220, 227 (6th Cir.), *cert. denied, sub nom Shelton v. United States*, 472 U.S. 1029 (1985). Johnson was unable to establish either requirement.

Greb testified at the suppression hearing[3] that he was looking for a bomb, not narcotics, because he had been

[2] DEA agents later discovered that the Detroit address used on the airbill was across the street from Johnson's childhood home. The telephone number on the airbill belonged to Brian Webster who was found flushing cocaine down the toilet when police arrived with a search warrant. While searching Brian Webster's home, DEA agents also discovered over $73,000 in cash and a triple-beam scale.

[3] Johnson also claimed that Greb's testimony at the suppression hearing was inconsistent with his testimony at trial. However, the district court found the witness to be "credible . . . honest and forthright." We can not overturn that finding of fact unless clearly erroneous. *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

warned to look out for explosives. In fact, he further testified that, during his two year tenure as a clerk in the American Airlines express package office, he had opened five or six packages and had found drugs on only one previous occasion. In addition, there was no evidence that the police encouraged Greb to open the package or that Greb had any specialized knowledge of how to identify drug packages. Greb testified that his decision to open the box was self-motivated and free of any governmental involvement. Since the Constitution does not prohibit private searches even if they are unreasonable, the cocaine obtained through the search of Johnson's box was properly admitted.

Johnson next argues that there was insufficient evidence to support his conviction. We reject this argument. Reviewing the evidence in the light most favorable to the government, if a rational trier of fact could have found guilt beyond a reasonable doubt, the evidence, even if circumstantial, will support the conviction. *United States v. Adamo*, 742 F.2d 927, 932 (6th Cir.), *cert. denied*, 467 U.S. 1193 (1984). Johnson's defense was that he was an unknowing courier. However, based on the evidence presented at trial, the jury could have reasonably concluded that Johnson was aware that there was cocaine in the box because he attempted to return to Los Angeles without claiming it.

In a motion to suppress,[4] Johnson argued that the DEA agents did not have probable cause to arrest him; and therefore, any evidence obtained as a result of the search incident to that arrest was the fruit of an illegal arrest. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983). The district court properly rejected this argument, finding

[4] The district court refused to hear this motion because it was not timely filed. At trial, defense counsel objected to the introduction of any evidence obtained as a result of the search incident to the warrantless arrest, forcing the court to address the issue of probable cause.

that there were sufficient facts to support the agents' belief that criminal activity was afoot. Johnson had attempted to claim the cocaine-filled package, and, instead of waiting the fifteen minutes for the box he had flown halfway across the country to deliver, he chose to take the next available flight back to the west coast. This behavior was inconsistent with that of an innocent courier, and constituted sufficient probable cause to arrest.

Finally, Johnson argues that following his conviction, he was improperly sentenced under the mandatory minimum sentence provision found in 21 U.S.C. § 841, therefore making him ineligible for parole. The district court judge specified that Johnson's sentence was independent of a statutory five year minimum. The district court said:

> I did not give him five years because I thought I had to. I want that to be clear. I think as a matter of law there is a five year minimum, . . . but the point I want to make is that I would have given him five years whether there was a mandatory minimum or not.

(Hearing on Motion for Bond Pending Appeal Tr. 374, 376). Both the government and the defense agree that there is no mandatory minimum in this case and we agree. However, since the district court said at the time of sentencing that he would have given the same sentence, regardless of the minimum, we find no error.

Accordingly, for the foregoing reasons, we AFFIRM.

No. 88-1791

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HUGH L. JOHNSON,
Defendant-Appellant.

ORDER

This matter is before the court upon consideration of a petition for rehearing filed by the appellant of this court's per curiam opinion of May 23, 1989 affirming the decision of the district court.

Having carefully examined the petition and the record, this court finds that it misapprehended no question of law or fact in its per curiam opinion.

It is therefore ORDERED that the petition for rehearing be, and it hereby is, denied.

ENTERED BY ORDER OF
THE COURT

/s/ LEONARD GREEN

LEONARD GREEN, *Clerk*